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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN AND ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' REPLY BRIEF TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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I. INTRODUCTION

The Motion to Dismiss or Affirm ("Motion") is without merit and should be denied. Appellees seek to circumvent, as did the state court below, the clear holdings of several recent and important decisions of this Court. By mentioning only in passing the holding of the California Supreme Court, appellees seem to acknowledge that not even they can reconcile that court's reasoning with the controlling precedents of this Court. Indeed, appellees admit this case involves an "important antitrust issue" but nevertheless assert that no substantial federal question is presented. To the contrary, the erroneous opinion below, if allowed to stand, will eviscerate recent rulings of this Court, elevate parochial local interests over paramount federal economic policy and create chaos in the lower courts.

II. THE DECISION BELOW IS CONTRARY TO UNAMBIGUOUS HOLDINGS OF THIS COURT

In a less-than-spirited, four paragraph defense of the state court's opinion, Motion at 4-5, appellees argue only that the Sherman Act preemption issue was "fairly resolved" by the state court. Appellees' only defense is that the radical opinion below was "strongly suggested" in *dicta* in a footnote in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (hereinafter *"Boulder"*). Motion at 4. Appellees' reliance on one *Boulder* footnote to justify the decision below, which created a new and unprecedented rule of federal law, strains the imagination and stands recent rulings of this Court on their head.

The notion that municipalities have a blanket exemption from the Sherman Act was put to rest by this Court's decisions in *Boulder* and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*"). Municipalities are exempt from the antitrust laws only if the challenged activity is engaged in pursuant to a "clearly articulated and affirmatively expressed" state policy. *Lafayette*, 435 U.S. at 410, 413; *Boulder*, 455 U.S. at 51-55. Additionally, where, as here, a municipal regulation of private parties is involved, active state supervision must be shown. *Town of Hallie v. City*

of Eau Claire, ___ U.S. ___, 53 U.S.L.W. 4418, 4421, n. 10 (3/27/85) (hereinafter "*Town of Hallie*"); *Lafayette,* 435 U.S. at 410; *Boulder,* 455 U.S. at 51, n. 14.

Yet there is no state policy in California authorizing rent control nor is there any active state supervision of appellees' price-fixing program. Even the state court below recognized this uncontrovertible fact, acknowledging that "California has no rent control statute." *Fisher v. City of Berkeley,* 37 Cal.3d 644, 655, 693 P.2d 261, 262, 209 Cal.Rptr. 682 (1984); Jurisdictional Statement Appendix ("J. S. App.") A at A-6.

Nor is there any state constitutional provision which "clearly articulates and affirmatively expresses" a state policy authorizing local rent control. Article XI, section 7 of the California Constitution, relied upon but not quoted by appellees, Motion at 16, merely states:

> A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

Boulder makes clear that such a generalized grant of authority is not a "clear articulation and affirmative expression" of state policy and does not immunize appellees from the Sherman Act.

To circumvent *Boulder* and attempt to justify the state legislature's silence and neutrality, appellees argue that there has been no express legislative authorization of rent control because "the [state] Legislature has been powerless to expand or repeal the authority of cities to enact rent control laws . . ." Motion at 17. Appellees' theorize that the above-cited section of the state Constitution provides general authority for municipalities to enact local laws including rent control and thus renders any state legislation on the subject "meaningless."

This argument, which is made for the first time in this Court, is demonstrably wrong and does not justify the Legislature's silence and neutrality. The California Legislature plainly has the power to authorize cities to engage in rent control or to prohibit them from doing so. Article XI, section 7, upon which appellees rely, specifically states that cities may only enact local ordinances which are "not in conflict with general laws." General laws are those enacted by the Legislature. CAL. CONST. art. IV, §§ 8, 16. State legislation plainly prevails over conflicting local ordinances enacted pursuant to Article XI, section 7. *Birkenfeld v. City of Berkeley* 17 Cal.3d 129, 140, 550 P.2d 1001, 1009, 130 Cal.Rptr. 465 (1976).

III. THERE ARE NO ALTERNATIVE JUSTIFICATIONS TO SUPPORT THE ERRONEOUS RULING BELOW

A. The Ordinance Conflicts With The Sherman Act.

Appellees' argument that the Ordinance involves no conspiracy and, therefore, cannot violate Section 1 of the Sherman Act, Motion at 9-10, is fatally simplistic in its failure to recognize the existence of the price restricting combinations created by the Ordinance and the fundamental conflict between this rent-fixing program and the Sherman Act.

In the case at bench, the Ordinance destroys price competition among owners of 23,000 rental units and compels participation in a far stronger and more forceful vertical price-fixing combination than any similar arrangement in the private sector. *Cf. U.S. v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *Albrecht v. The Herald Co.,* 390 U.S. 145 (1968). This, in turn, inevitably results in a horizontal combination which precludes all landowners in Berkeley from engaging in price competition. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 103 (1980) (hereinafter "*Midcal*").

Yet the question is not whether the Ordinance is actionable under the Sherman Act; the Ordinance is preempted if it restricts vigorous price competition contrary to the pro-competition policies and goals of a federal law, in this case Section 1 of the Sherman Act (15 U.S.C. § 1). *See Hines v. Davidowitz,* 312 U.S. 52 (1941); *Jones v. Rath Packing Co.,* 430 U.S. 519, 526 (1977); *see also Nash v. Florida Industrial Comm.,* 389 U.S. 235, 239 (1967).

The fact that rent-fixing is accomplished by a governmental agency rather than by "purely" private action does not provide any defense to appellees. Indeed, a preemption challenge can only be addressed to governmental enactments, not private conduct. In *Midcal,* this Court recognized that a governmental program similar to appellees, vertically imposing price regulation on private parties, was preempted by the

Sherman Act and thus void. *See also Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).[1]

B. The Control Of Rental Rates Clearly Affects Interstate Commerce.

Appellees' contention that rent control of 23,000 units within the Berkeley city limits is strictly local, Motion at 11-13, portrays Berkeley as an island existing unto itself. In so arguing, appellees completely ignore the precedents of this Court concerning the expanse of Congressional power.

In an authoritative analysis of the reach of Congressional jurisdiction under the Commerce Clause, *Perez v. United States*, 402 U.S. 146, 150 (1971), held that interstate commerce was sufficiently involved in a single extortionate credit transaction which occurred wholly within one city. This Court ruled that—in enacting the federal law against "loan-sharking"—Congress attempted to use the full extent of its commerce power. As such, if the class of activity involved substantially affects interstate commerce then Congress can regulate the entire class and also reach individual incidents within the class even though that individual incident does not in and of itself affect interstate commerce. 402 U.S. at 153-154; *see Wickard v. Filburn*, 317 U.S. 111 (1943) (wheat grown by one farmer wholly for home consumption purposes affects interstate commerce). *Wickard* and *Perez* are unquestionably applicable to the appraisal of interstate commerce in antitrust cases. *Mandeville Island Farm, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Burke v. Ford*, 389 U.S. 320 (1967).

In enacting the Sherman Act, Congress "left no area of its constitutional power unoccupied; it exercised all of the power it possessed." *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945). More important to this case, the Sherman Act

[1] Professor Phillip Areeda described the principle thusly:

> It is exceedingly important to see that neither antitrust liability nor antitrust damages are necessary to hold, in any particular case, that the federal antitrust regime applies in preference to a federal or state regulatory effort. . . . Such conclusions are routinely reached without any finding that the federal agency or its officials have violated the antitrust laws or are liable for antitrust treble-damages . . . [Testimony at Official Proceedings of U.S. Senate Judiciary Committee, June 30, 1982.]

is intended to reach those restraints, such as the rent-fixing program here challenged, which occur wholly within one city or one state, but which substantially affect interstate commerce. *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944); *Goldfarb v. Virginia State Bar*, 421 U.S. 733 (1975); *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) (hereinafter *"McLain"*).

Pursuant to the "effect on commerce" test, it need only appear that the impacted local activity, *e.g.*, the rental housing business, has a substantial effect on interstate commerce and it is not necessary that the particular restraint, *e.g.*, rent control, be shown to have an interstate commerce effect. The Court of Appeals recently stated in *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 at 818 (9th Cir., 1982), *cert. denied*, 456 U.S. 1011 (1982):

> To meet the "effect on commerce" test, Turf need only allege that the local activity of horseracing has a substantial effect on interstate commerce, not the "more particularized showing" that the alleged illegal conduct, the lease provision, has a substantial effect on interstate commerce. (Citations.) There must be a "sufficient nexus" between the activity and interstate commerce so that it can be said "as a practical matter of economics" there is "a not insubstantial effect on the line of commerce involved." *Community Builders*, 652 F.2d at 827 (citing *McLain*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441).

Appellees' argument that its rigid price control scheme has an "insubstantial effect" on interstate commerce is tantamount to arguing that Congress does not have the constitutional power—under the Commerce Clause—to prohibit such pervasive anticompetitive conduct. Yet, there can be no doubt that a private conspiracy among Berkeley landowners to fix prices for all residential rental property in the city would be well within the reach of the Sherman Act; that the actor is the city does not change the impact of the price-fixing program on interstate commerce.

The Ordinance's effect on rental housing and thus interstate commerce is evident "as a practical matter of economics."

Moreover the complaint[2] alleged that the Ordinance substantially reduced the value of rental units in the city, prevented landowners from charging rents sufficient to meet their mortgage obligations and inhibited the sale and refinancing of their properties. Complaint, ¶¶ 16-22. The Ordinance directly affects the purchase, sale and refinancing of property; it discourages capital improvements thereby affecting financing and the interstate flow of goods and materials. Ordinance §§ 10-13; J.S. App. G at A-122-131; See also J.S. App. H at A-140-151.

In *McLain,* under much less compelling circumstances, this Court found the necessary effect on interstate commerce where artifically high real estate commissions caused the prices of residential property to be artificially raised. *Id.* at 235.[3] This Court recognized that whatever stimulates or retards the volume of home sales or impacts the purchase price, has an effect on financing and title insurance thereby affecting commerce. *Id.* at 246. The Ordinance at issue here goes much further and is clearly within Congress' reach.

C. The State Of California Has No Clearly Articulated And Affirmatively Expressed Policy Authorizing Local Rent Control.

Appellees, apparently recognizing the weakness of the decision below, now urge this Court to summarily affirm on the theory that certain general "housing" statutes of the State of California "contemplate" that cities will enact rent control ordinances. Motion at 13-18. Uncomfortable with the state court's conclusion that there is no state rent control statute, appellees point to a legislative scheme to plan and promote the *development* of housing and contend that it "contemplates" rent controls. Government Code section 65580, indeed the entire act relied upon by appellees, deals with "improvement and development" of housing stock and clearly does not authorize rent control. It merely calls for general plans to provide for

[2] Appellees incorrectly suggest, Motion at 13, that the trial court allowed an amendment to the cause of action in the complaint challenging the Ordinance on its face; in fact, the only amendment allowed was to the cause of action challenging the Ordinance as applied. J. S. App. at A-4. The complaint is reprinted as Appendix 1 to appellees' Motion.

[3] The complaint herein alleged that the Ordinance caused real estate prices to plummet.

development of low cost housing, not transmutation of existing housing to low cost housing via rent control. As appellees themselves argue, the Ordinance exempts new construction or development. Motion at 6.

Two things should be noted about section 65589(b) and (c) upon which appellees rely. First, rent control is dealt with separately and distinctly from those measures that might be used to implement local general plans. Subsection (c) expressly denies that the article grants or repeals any authority of local governments to undertake measures to implement general plans. Rent control is addressed separately in subsection (b), clearly indicating that rent control is considered something other than a "measure that may be undertaken . . . to implement the housing element of the local general plan."

Second, subsection (b) is an express declaration of *neutrality* on whether municipalities may engage in rent control; it provides:

> Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which *may* exist of a local government to impose rent controls or restrictions on the sale of real property. (Emphasis added.)

This is precisely the kind of "blank check" rejected in *Boulder.*[4]

Town of Hallie demonstrates the flaw in appellees' argument. There, the City of Eau Claire refused to extend sewage treatment services to areas unless they agreed to become annexed by the City. This Court found that the alleged anticompetitive conduct was exempt because Wisconsin statutes expressly authorized cities to construct sewage systems and clearly stated that the cities had no obligation to provide services to unincorporated areas. 53 U.S.L.W. at 4420. In

[4] There, this Court said: "But plainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended with the powers *granted,*' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State . . . [455 U.S. at 55-56 (emphasis in original, footnote omitted).]"

short, the Wisconsin statutes expressly and specifically authorized the precise municipal conduct challenged in that antitrust suit. Contrasting the Wisconsin statute to the Colorado Home Rule Amendment in Boulder, this Court stated:

> [T]he State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that forseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was.

Id. at 4421 (footnote omitted).

The state statutes relied upon by appellees herein, unlike the Wisconsin statute, do not authorize appellees to engage in the activity specifically challenged here (*i.e.*, rent control). Contrary to appellees' claim, "contemplation" is *not* an *alternative* to clear articulation and affirmative expression of a state policy to impose regulation; it simply provides that *if* the challenged activity (*e.g.*, the right to restrict sewage service areas as in *Town of Hallie)* is authorized and clearly articulated, a reasonably foreseeable anticompetitive effect was contemplated as a part of that policy. Mere legislative awareness that a restraint is being engaged in and a legislative declaration of neutrality as to that restraint plainly does not constitute a declaration of state policy to impose those types of restraints nor an "affirmative addressing of the subject by the state." *Boulder,* 455 U.S. at 55-56.

Finally, it must be noted that *Lafayette* and *Town of Hallie* challenged anticompetitive conduct perpetrated by the municipality itself. This Court ruled in *Town of Hallie* that, under such circumstances, no active supervision by the state was necessary to find state action exemption. The instant case, however, like *Midcal,* involves a situation where the anticompetitive regulation is directed to private parties; in such circumstances active state supervision is plainly required.[5]

[5] *Town of Hallie,* 53 U.S.L.W. at 4421, n. 10. Appellees do not even mention this active state supervision requirement.

IV. PLENARY REVIEW IS NECESSARY TO AVOID CONFUSION IN THE LOWER COURTS

Even appellees admit that this case poses "important antitrust issues." Motion at 5. Yet, in this Court, appellees argue that the record below was "sparse" and that the "thorny" issues presented should be given more time to "percolate" in the lower courts. Motion at 7-8. But in the California Supreme Court, appellees urged the court to decide the antitrust issues because they were of great public importance.[6] The only explanation for this change of heart is that appellees are legitimately concerned that the opinion below so plainly flaunts controlling precedent of this Court that it will be reversed upon plenary review. Appellees' spurious "percolation" argument ignores the exhaustive scholarly, judicial and legislative commentary that has occurred since *Boulder.* Indeed, the framework to resolve the issues presented herein has already been established by this Court in *Midcal, Lafayette, Boulder* and *Town of Hallie.*

Finally appellees argue that summary disposition, although binding precedent of this Court, would be "opaque indeed" and thus not followed as *stare decisis* by the lower courts. Motion at 18. The thrust of this strange argument is that summary adjudication is desireable because no other court will be able to discern the reason for this Court's decision. The obvious lack of merit of this argument speaks for itself.

V. THE CONFISCATION ISSUES ARE SUBSTANTIAL

Whether appellees may deprive a landowner of the appreciated value of his or her property is a substantial federal question.[7] Appellees and the court below erroneously rely on zoning cases to support their conclusion that such confiscation is permitted; yet those cases involve only the "taking" of a future expectancy and not, as here, an existing property right. This

[6] This is memorialized in the opinion below:

> Defendants [appellees] likewise request that we address and resolve plaintiffs' antitrust contentions. Because of the extreme importance of the issues presented, we proceed to analyze plaintiffs' antitrust claims.

Fisher v. City of Berkeley, 37 Cal.3d at 654, 693 P.2d at 271 (footnote omitted); J. S. App. A at A-5.

[7] The complaint alleges that the Ordinance confiscated the value appellants' properties had gained over the years. See Appendix 1 to Motion, ¶¶ 16-22.

crucial distinction was illustrated by *Penn. Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) which stated that a taking is not established "[s]imply by showing that [plaintiffs] have been denied the ability to exploit a property interest *that they heretofore had believed was available for development . . .*" (Emphasis added.) The "unfulfilled expectancy" rationale for zoning cases does not apply to the case at bench, where the lower court authorized the taking of an existing property interest.

The failure to provide landowners any reasonably efficient means to obtain rent adjustments to offset the inevitable effect of inflation is, as found by a unanimous court of appeals below, an entirely independent basis for declaring the Ordinance unconstitutional.[8] In a city where there are 23,000 rental units, all of which are affected by inflation, it is patently unreasonable and inevitably confiscatory to require property owners to engage repeatedly in separate administrative hearings, pay substantial filing fees and prove by a preponderance of the evidence that inflation has eroded their frozen rental income. The cumulative effect of the Ordinance is to confiscate all but the property owners historic cash investment, freeze rents and allow future increases to offset the inevitable effects of inflation only after a evidentiary hearing at which the owner has the burden of proof. The confiscatory effects are obvious.[9]

The motion to dismiss should be denied.

DATED: May 8, 1985 Respectfully submitted,

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[8] Appellees' only answer is that such decisions must be made within 120 days. Motion at 21. Even this is not true; the Ordinance authorizes unlimited extensions "for good cause." Ordinance § 12(b)(12); J. S. App. at A-128. (In truth most decisions take hundreds of days.)

[9] "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . ." *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591; 70 L.Ed 747, 749; 46 S.Ct. 408 (1926).